In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1152

DOMINICK SEMINARA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the evidence failed to establish an intent to defraud and that a prior state prosecution for grand larceny and forgery barred his federal prosecution for mail fraud.

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of 50 counts of mail fraud in violation of 18 U.S.C. 1341. He was sentenced to concurrent terms of three years' imprisonment on counts 1 through 45; the court specified, however, that petitioner be confined for a period of five months and that execution of the remainder of the sentence be suspended in favor of probation. Petitioner was also fined a total of $2,500 on counts 46 through 50. The court of appeals affirmed without opinion (Pet. App. A).[1]

[1]The judgment of the court of appeals was entered on January 7, 1976. The petition for a writ of certiorari was filed on February 11, 1976, and is therefore out of time under Rule 22(2) of the Rules of this Court.

The evidence showed that petitioner participated in an extensive scheme whereby his mail-order photo developing company sent unsolicited "prepaid" mailers with a "money back guarantee" to persons throughout the country and at the same time, without the knowledge or approval of the recipients, charged their credit cards for the mailers and received payment for the charges from the relevant banks. Petitioner exercised continuous supervision over his employees in executing the scheme (Tr. 211-215, 352-354, 583-584), instructed them how to proceed (Tr. 199, 577), and formulated a response to be given in the event of complaints (Tr. 222-223, 404-405, 588, 1236-1237). The scheme yielded about $120,000 in six weeks.

1. Petitioner claims that the evidence failed to demonstrate any intent to defraud on his part, because he "made an offer [that] dissatisfied consumers could refuse to accept" (Pet. 29), he was "at all times willing to comply with the offer upon acceptance by the customers" (Pet. 27), and "[t]hose consumers who did not want to accept the offer received refunds or at a later time [he] and his company agreed to process the films" (*ibid.*). The essence of the fraud, however, was that recipients of the unsolicited mailers had their credit cards charged without their knowlege or approval. They were not told that they had to reject the "offer" to avoid credit card charges; indeed, by the time they received the mailers their accounts had already been charged. Moreover, it was not petitioner who provided the recipients with refunds but rather the banks that issued the credit cards. The banks were not advised by petitioner that the cards were unauthorized, and they were never reimbursed for the refunds by petitioner or his company (Tr. 669-672, 1038).

The evidence of fraudulent intent was, in sum, overwhelming.

2. Petitioner was initially indicted in December 1973 on state charges of grand larceny, forgery, criminal possession of forged instruments, and falsification of business records. These charges were based on the deposit of several fraudulent Master Charge sales slips in the photo company's account at a branch office of the First National City Bank.

A federal grand jury investigation was thereafter commenced, and petitioner was indicted on December 6, 1974, on 50 counts of mail fraud.

On December 31, 1974, more than a year after the original state indictment, the state grand jury returned a second indictment containing similar charges but based on several other deposits of fraudulent charge slips. On January 13, 1975, petitioner pleaded guilty in state court to a reduced charge of one count of grand larceny in the third degree (stealing property exceeding $250 in value).[2]

Prosecution under the 50-count federal indictment was commenced on June 24, 1975, and the jury returned its guilty verdict on July 14, 1975.

Thereafter, in August 1975, petitioner was sentenced in state court to an indeterminate term of up to three years' imprisonment.[3] In September 1975, petitioner was sentenced on the federal charges. That sentence was made to run consecutively to the prior sentence on the state charge.

Petitioner contends that, under double jeopardy principles, the federal prosecution was barred by the

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[2]Petitioner was permitted to enter an "*Alford* plea," which, under state law, did not constitute an admission of guilt.

[3]Petitioner's appeal from the state judgment is pending before the Appellate Division of the Supreme Court of New York.

prior state prosecution. He apparently recognizes that under the decisions of this Court "a federal prosecution is not barred by a prior state prosecution of the same person for the same acts." *Abbate* v. *United States*, 359 U.S. 187, 194; see also *United States* v. *Lanza*, 260 U.S. 377. Petitioner suggests, however, that those decisions should be reconsidered and overruled (Pet. 34, 37).

Like the petitioner in *Abbate*, who urged unsuccessfully that *Lanza* should be overruled, petitioner here advances "[n]o consideration or persuasive reason not presented to the Court in the prior cases * * * why we should depart from [the] firmly established principle" (359 U.S. at 195). Indeed, the federal prosecution here, which grew out of a nationwide mail fraud scheme, was much broader than the state prosecution, which related only to a small number of local manifestations of the nationwide fraud. Even if the federal prosecution can fairly be characterized in these circumstances as involving the same criminal acts as the state prosecution, this case, like *Abbate*, illustrates the "undesirable consequences" (359 U.S. at 195) that would follow from adoption of the rule sought by petitioner. Here, as in *Abbate*, "the defendants' acts impinge more seriously on a federal interest than on a state interest"; if this federal prosecution were barred by the much more limited state prosecution, "federal law enforcement must necessarily be hindered" (*ibid.*).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1976.

DOJ-1976-05

CERTIORARI DENIED